LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 29 1957
JOHN T. FEY, Clerk

No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1957

BORGE JORGENSEN, PETITIONER

v.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
L. W. POST,
DAVIS W. MORTON,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	2
Argument	3
Conclusion	8
Appendix	9

CITATIONS

Cases:

Burnet v. *Brooks*, 288 U.S. 378	6
Burnet v. *Guggenheim*, 288 U.S. 280	3
Harris v. *Commissioner*, 178 F. 2d 861, reversed, 340 U.S. 106	4, 5, 7
Merrill v. *Fahs*, 324 U.S. 308	5, 6, 7

Statutes:

Internal Revenue Code of 1939:

Sec. 812(b) (26 U.S. C. 1952 ed., Sec. 812(b))	6, 9
Sec. 861(a) (26 U.S.C. 1952 ed., Sec. 861(a))	6
Sec. 863(b) (26 U.S.C. 1952 ed., Sec. 863(b))	5, 7, 10
Sec. 864(a) (26 U.S.C. 1952 ed., Sec. 864(a))	6
Sec. 1000 (26 U.S.C. 1952 ed., Sec. 1000)	4
Sec. 1000(a) (26 U.S.C. 1952 ed., Sec. 1000(a))	10
Sec. 1000(b) (26 U.S.C. 1952 ed., Sec. 1000(b))	6, 10
Sec. 1002 (26 U.S.C. 1952 ed., Sec. 1002)	6, 11

Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 403(b)	6
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 303(a)	6
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 805	6

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 337

BORGE JORGENSEN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 9-14) and the dissenting opinion of Judge Laramore (Pet. 15-17) have not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered May 8, 1957. (Pet. 9, 14.) The petition for a writ of certiorari was filed August 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether the gift of a bank deposit situated within the United States by a nonresident alien not doing busi-

ness within the United States is subject to the gift tax under Section 1000 of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Sections 812(b)(3) and (4), 863(b), 1000(a) and (b), and 1002 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

The pertinent facts, as set forth in the Court of Claims opinion (Pet. 9-14), appear as follows:

The petitioner's father, Niels C. Jansen, was a citizen and resident of Denmark. (Pet. 9.) He was not doing business in the United States. (Pet. 10.) He had for many years prior to World War II maintained a bank account in his own name with the Guaranty Trust Company of New York (hereinafter called Guaranty). In March, 1940, after the invasion of Denmark by the Nazis, Mr. Jansen told the petitioner that he was giving him the bank account, but that he would make no written confirmation of the gift, because such evidence might fall into the hands of the Germans who might claim the account if they learned of it. Mr. Jansen advised Guaranty to subhead the account "Foreign Syndicate Separate Account." (Pet. 9.)

In 1945, after the liberation of Denmark, Mr. Jansen advised Guaranty that petitioner was the owner of the account. In 1949, the bank was given a license by the Office of Alien Property to transfer the account to the petitioner. (Pet. 9-10.) Under these facts, the Court of Claims held (and this issue is not contested here) that the gift took effect on October 5, 1949, the date of the license to the Bank. (Pet. 14.)

In October, 1949, the federal tax authorities served on Guaranty a notice of a levy of a gift tax on the bank account in the amount of $36,133.08, consisting of $23,908.37 of principal and $12,224.71 of interest. The entire amount was paid out of the account. (Pet. 10.) Petitioner filed a claim for refund, and $11,724.06 of the interest applicable to the period from December 6, 1941, to December 30, 1949, was refunded, with the remainder of the claim being rejected. (Pet. 10, 14.) Under the Court of Claims' partial denial of respondent's motion for judgment on the pleadings, judgment was entered for petitioner in the amount of $1,042.64, representing the remaining interest paid to and retained by the Government. (Pet. 14.) Accordingly, the principal amount of the gift tax paid—*viz.* $23,908.37—is the amount here in issue. (Pet. 10.)

ARGUMENT

The decision of the majority of the Court of Claims against the asserted exemption from the gift tax of a bank account in a United States bank owned by an alien nonresident, not engaged in business within the United States, is plainly correct, and no reason is shown to warrant further review by this Court. There is no conflict between the decision below and that of any Court of Appeals on the same matter, nor with applicable decisions of this Court. It may be noted that, although the gift tax has been in effect since 1932,[1] the exemption here claimed has, so far as is known, been asserted only once before. The same arguments raised on behalf of the taxpayer were rejected by the Court of Appeals

[1] There was also a gift tax from 1924 to 1926. See *Burnet v. Guggenheim*, 288 U.S. 280.

for the Second Circuit in *Harris* v. *Commissioner*, 178 F. 2d 861, reversed on other issues, 340 U.S. 106.[2]

Adopting the interpretation accorded Section 1000 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 10-11) in the *Harris* case, *supra*, the Court of Claims correctly concluded (Pet. 13):

> In the instant case, section 1000 is really not susceptible of the interpretation which the plaintiff asks us to give it. Nor is there serious disharmony between the natural meaning of the words of section 1000 and section 863(b) of the Revenue Code of 1939 relating to the estate tax. To be sure, section 863(b) would have made this bank account nontaxable to the estate of Mr. Jansen if he had continued to own it until his death, and had continued to be a non-resident and a non-citizen of the United States, not doing business in the United States. The purpose of this provision in the estate tax statute was to put American banks and insurance companies on a basis on which they could compete with foreign companies for the money of foreigners. To give effect to section 863(b) it is not necessary to read into section 1000 a Congres-

[2] In the *Harris* case, *supra*, a petition for certiorari was filed with respect to three questions; the first of which presented the instant issue, as follows:

> 1. Whether money deposited in American banks by or for a nonresident alien, not engaged in business in the United States, is exempt from the gift tax as property without the United States.

On March 27, 1950, certiorari was granted as to questions 2 and 3, which are not here applicable, but was not granted as to question 1. 339 U.S. 917. Subsequently, rehearing of the petition for certiorari as to question 1 was denied on April 24, 1950. 339 U.S. 946.

sional intention that a gift of such a chose in action, made long before the owner's death, and after which he might well become a citizen or resident of the United States, or might engage in business here, should be similarly tax-free.

Judge Learned Hand's opinion in the *Harris* case, *supra*, sets forth (pp. 862-864) the legislative history and the statutory basis of the Second Circuit's ruling that the failure by Congress to provide in the gift tax for an exemption of deposits in American banks belonging to nonresident aliens not engaged in business in the United States, such as is explicitly provided for in the estate tax (Section 863(b) of the Internal Revenue Code of 1939, Appendix, *infra*, p. 10), represented a deliberate legislative choice. This construction applies with equal force to the instant case. Since the donor of the bank deposit in each case was a nonresident alien, not engaged in business in the United States, it is immaterial where the donor was living at the time the gift was made. For federal gift tax purposes, it obviously makes no difference whether the nonresident alien, who is not doing business, is visiting in the United States on a temporary visa or is residing abroad.

Merrill v. *Fahs*, 324 U.S. 308, upon which petitioner relies (Pet. 6-7), affords him no support. The settled principle is, of course, that the gift tax is supplementary to the estate tax, that the two are in *pari materia*, and must be construed together.[3] Here, we

[3] While the prevention or compensation for avoidance of the estate tax is an important purpose of the gift tax, this is not its only purpose. Discouraging family distributions, so as to avoid

contend that the phrase substantially identical to both taxes, namely, property "situated in the United States" (Internal Revenue Code of 1939: (estate tax) Sections 861(a), 864(a); (gift tax) Section 1000(b)) is to receive identical construction, namely, to comprehend deposits of alien nonresidents in American banks. The estate tax statute was amended in 1921 expressly to except such deposits (Revenue Act of 1921, c. 136, 42 Stat. 227, Section 403(b)(3)); the amendment was no mere clarification or gloss of the existing language (*Burnet* v. *Brooks*, 288 U.S. 378, 388-389, 394-395), but an explicit exception of that which would otherwise have been taxed as property 'situated in the United States". The exception was never carried over into the gift tax. On the other hand, in *Merrill* v. *Fahs*, *supra*, as this Court pointed out (pp. 312-313), even without the "specific provision" contained in the estate tax only,[4] Congress undoubtedly intended the language common to both taxes of "adequate and full consideration in money or money's worth" (Internal Revenue Code of 1939, Section 812(b), Section 1002, Appendix, *infra*, pp. 9-10, 11) to exclude relinquishment of dower and other marital rights explicitly described in the spe-

---

high income surtaxes, is, for example, another recognized purpose. *Merrill* v. *Fahs*, *supra*, p. 313. The transfer here of Mr. Jansen's bank account to the petitioner, his son, might fall within the latter aspect of the gift tax, since, as the Court of Claims pointed out (Pet. 13), after the making of the *inter-vivos* gift, Mr. Jansen "might well become a citizen or resident of the United States, or might engage in business here." Such a change of status would, of course, render the donor liable to pay federal income taxes.

[4] Section 303(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 805 of the Revenue Act of 1932, c. 209, 47 Stat. 169, now found in Section 812(b) of the Internal Revenue Code of 1939.

cific provision peculiar to the estate tax. As the legislative history and the course of judicial decision discussed in the *Merrill* opinion demonstrate (p. 312), "Plainly, the explicitness was one of cautious redundancy to prevent 'subversion of the legislative intent'."

Thus, the *Merrill* case presents a clear contrast to the statutory situation presented in *Harris* v. *Commissioner, supra,* and here, for the purpose of the specific provision involved in the instant case (Section 863 (b)) was to create an exception to the coverage comprehended in the language common to both statutes. Here, as in the *Merrill* case, the common phrase received the same interpretation by the Court of Claims below, but an express exception to it contained in the estate tax, strictly to be construed as a tax exemption, was not extended by implication to the gift tax. (Pet. 13.) Emphasizing the practical considerations which could result in a donor's loss of his tax status (as a nonresident alien, not doing business in the United States) between the time of making the *inter vivos* gift and the time of death, the Court of Claims properly held that the omission of the exemption from the gift tax should not be supplied by recourse to the purpose which actuated the exclusion in the estate tax. (Pet. 13.) The economic consequences of the incidence of the gift tax and those of the estate tax are not identical, and Congress had many reasons for not regarding as appropriate in the one case an exception which it created in the other.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
L. W. POST,
DAVIS W. MORTON
Attorneys.

AUGUST, 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(b) *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

* * * * *

(3) for claims against the estate,

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, * * *

* * * * *

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. * * *

For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

* * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

SEC. 863. PROPERTY WITHOUT THE UNITED STATES.

The following items shall not, for the purpose of this subchapter, be deemed property within the United States:

* * * * *

(b) *Bank Deposits.*—Any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death.

(26 U.S.C. 1952 ed., Sec. 863.)

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case

of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(26 U.S.C. 1952 ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

(26 U.S.C. 1952 ed., Sec. 1002.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 • 456759 • 272